United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1061

To be argued by
ALBERT S. DABROWSKI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1061

UNITED STATES OF AMERICA,

Appellee,

—v.—

LEON EUGENE McCLOUD,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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—v.—

LEON EUGENE MCCLOUD,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

On December 6, 1973 a Federal Grand Jury sitting in Hartford, Connecticut, returned a two-count indictment charging the defendant with the November 28, 1973 armed robbery of the State Dime Savings Bank in Enfield, Connecticut in violation of Title 18, United States Code, Sections 2113(a) and (b). The defendant had been arrested on the day of the robbery.

On December 14, 1973 McCloud entered a plea of not guilty to each count in the indictment. On March 18, and 19, 1974 a hearing was held on the defendant's Motion to Suppress evidence, including $13,790 found in his apartment basement, and the defendant's Motion to Suppress lineup identifications made on the evening of the bank robbery. On September 23, 1974, the Honorable M. Joseph Blumenfeld, United States District Judge, issued a written decision denying the defendant's motions.

bank in the Enfield Mall, testified that he observed a black male acting in a suspicious manner in a car outside his bank on the date of the robbery. The license number of that car, which Stanio wrote down, matched the license of the vehicle rented by McCloud. (Tr. 154, 156.)

The government also introduced a business card bearing the name "Hon. Robert H. Steele, M.C. 2nd District, Connecticut" which was found in the defendant's wallet at the time of his arrest. Ernest Woolette, the bank manager, testified that the robber had approached him prior to the actual holdup and inquired about obtaining a loan. During this conversation McCloud stated he had "talked to Robert Steel and Governor Meskill" about obtaining business loans. (Tr. at 10.)

Also introduced at the trial was $13,790 in cash including all the bait money (75 $20 bills) taken from the bank which was found in the basement of McCloud's apartment building approximately 8 hours after the robbery. A 9mm pistol was found with the money. Bullets fitting the pistol were found in McCloud's car. In addition, Daisy Jones, a neighbor and friend of the defendant, testified that when the FBI came to McCloud's apartment following the robbery Eva Edwards, McCloud's wife, gave her $610 to "hold for her." (Tr. at 229, 232.) The money found in the basement plus the money recovered from Daisy Jones totaled $14,400 ($7 more than the amount taken from the bank). McCloud had received a $10 return from his deposit on the rented car.

The Lineup

At approximately 7:20 p.m. on the day of the robbery, FBI agents, during the course of a general investigation concerning the robbery, contacted the defendant at his apartment at 11 Winter Street, Hartford (Hr. at 14, 31.) The agents were initially met at the door by the defendant's

common-law wife, Eva Edwards, who stated that McCloud did not live there (Hr. at 15.) McCloud subsequently emerged from another room in the apartment and was questioned by the agents concerning his whereabouts that afternoon (Hr. at 15.) Although McCloud was considered to be the "best lead" the FBI had at that moment (Hr. at 32) he was not a suspect (Hr. at 32) and was not accused of the robbery. (Hr. at 16.)

During the questioning at the apartment Special Agent Dewey Santacroce asked McCloud to go to the Hartford Police Station to appear in a lineup. (Hr. at 18, 44.) Santacroce and Special Agent James Millen both testified that McCloud consented without reservation. (Hr. at 18, 45.) The defendant and his wife testified that Santacroce asked McCloud to go downtown to "clear things up" (Hr. at 59, 79) and that McCloud had initially objected by stating he was tired and would wait until the next day. (Hr. at 59, 79.)

Agent Millen testified that McCloud arrived at the police station at approximately 8:15 p.m. and was taken to an interview room where, at approximately 8:25 p.m., he read and executed a standard advice of rights form. (Hr. at 46, 107-108.)

At 9:30 p.m. McCloud read and executed a standard rights at lineup form (Hr. at 108) and orally indicated he understood what his rights were. (Hr. at 110.) At the lineup, Ernest Woolette, the bank's branch manager, positively identified McCloud as the robber. (Hr. at 48). Millicent Root, the assistant branch manager, identified McCloud as resembling the robber but was unable to make a positive identification. (Hr. at 48-49).

Following the lineup, at approximately 10:00 p.m., McCloud was placed under arrest. (Hr. at 113).

The Search

Shortly after the defendant's arrest at approximately 10:00 p.m. he consented to a search of his apartment and automobile. The defendant and his wife executed separate but identical consent forms authorizing a search of their residence at "11 Winter Street, 1st Floor, Hartford, Conn."

During the search of the residence, conducted in the presence of the defendant's wife, Special Agent Harry Brandon discovered a door leading to a basement. (Hr. at 139.) Special Agents Brandon and Dewey Santacroce testified that the defendant's wife indicated she had no objection to a search of the basement. (Hr. at 139, 156.) Mrs. McCloud testified that the agents neither asked nor were given permission to search the basement. (Hr. at 164.)

A 9mm pistol and $13,790 in cash was discovered in the basement. Seventy-five $20 bills matched bait money taken from the bank. Shells fitting the pistol were found in the defendant's automobile.

ARGUMENT

I.

The defendant freely and voluntarily consented to participate in the lineup.

The government does not claim prior judicial authorization was obtained to compel the defendant to participate in a lineup. The government submits, and more importantly Judge Blumenfeld held, that the defendant consented of his own free will, without intimidation, to accompany the FBI agents to the Hartford Police Station for the purpose of establishing, possibly by appearing in a lineup, his innocence in the minds of those agents. (Ruling at 9.)

At the suppression hearing below there was considerable conflict between the testimony of FBI Agents Dewey Santacroce and James Millen and the testimony of the defendant, his common-law wife and a neighbor, Daisy Jones. However, the Court credited the testimony of the agents over the testimony of the defendant, his wife and Mrs. Jones and specifically found the facts set forth in the testimony of the agents to be true. (Ruling at 6.) Therefore, this Court's review on appeal involves "facts found from conflicting testimony, having in mind that a '[d]etermination of credibility was for the judge who saw and heard the witnesses,' *United States* v. *Fernandez*, 456 F.2d 638 (2d Cir. 1972), and that his findings must stand unless shown to be clearly erroneous, *United States* v. *Sheard*, 473 F.2d 139, 146 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 943 (1973)." *United States* v. *Boston*, 508 F.2d 1171, 1178 (2d Cir. 1974) (citations modified).

Judge Blumenfeld summarized the testimony of Agents Santacroce and Millen as follows:

> Agent Santacroce testified that he arrived at the defendant's apartment along with three other agents and an Enfield police officer at about 7:30 p.m., four and a half hours after the robbery. They considered the defendant their best lead for information on the robbery; they had not yet focused on him as a prime suspect. Their knocks at the apartment were answered by Ms. Eva Edwards, the defendant's co-tenant and common law wife. She denied having seen the defendant recently or knowing his whereabouts. While she was pursuing this line the defendant appeared from within the apartment and identified himself. No warnings of constitutional rights were given the defendant, who was asked if he had knowledge of the robbery. *After about fifteen minutes, the defendant was asked to go to the police station to possibly appear in a line-up which might clear him of involve-*

ment in the robbery. The defendant first said nothing, then said he would be glad to go. Agent Millen gave substantially similar testimony. He added that the agents were admitted by Ms. Edwards into the kitchen of the apartment, into which the defendant appeared from the living room without having previously been seen by the agents. *Agent Millen testified that the defendant consented immediately to the trip to the police station for a line-up, and that he did not at any time indicate he did not wish to go.* (Ruling at 4.) (Emphasis added.)

Whether consent is free and voluntary "*is a question of fact to be determined from the totality of all circumstances.*" *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973). Although the government has the burden of establishing consent by "clear and convincing evidence," *United States* v. *Mapp*, 476 F.2d 67, 77 (2d Cir. 1973), a finding of free and voluntary consent will not be lightly overturned. *See e.g.*, *United States* v. *Bracer*, 342 F.2d 522, 524-525 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965); *Drummond* v. *United States*, 340 F.2d 983, 988 (8th Cir. 1965); *United States* v. *DuShane*, 435 F.2d 187, 192 (2d Cir. 1970); *United States* v. *Callahan*, 439 F.2d 852, 861 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971). The District Court found that the consent was voluntary and was made on the defendant's "own familiar territory," *see Schneckloth* v. *Bustamonte*, *supra*, at 247, and that far from being aged or debilitated, *cf. United States* v. *Albarado*, 495 F.2d 799, 801-802 (2d Cir. 1974), and therefore more easily susceptible to coercion, the defendant was twenty-seven years of age and had a high school education. (Ruling at 7.)

The appellant argues that even if the defendant voluntarily went to the police station the third sentence in the consent to the lineup form which begins "You are required to appear in a line-up . . . ", which form was signed by the defendant, represents a wrongful claim of lawful authority

similar to *Bumper* v. *North Carolina*, 391 U.S. 543 (1968) which resulted in an unlawful seizure of the magnitude in *Capp* v. *Murphy*, 412 U.S. 291 (1973) and *Davis* v. *Mississippi*, 394 U.S. 721 (1969).[2] The appellant recognizes that the lineup itself did not constitute an unlawful seizure. An individual properly in custody may be compelled to participate in a lineup because the evidence disclosed is merely a physical characteristic, like handwriting samples or voice exemplars, and is not of a testimonial or communicative nature. *See, e.g., United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Mara*, 410 U.S. 19 (1973); *United States* v. *Wade*, 388 U.S. 218 (1967).

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[2] The complete text of the consent form is as follows:

YOUR RIGHTS AT A LINEUP

You have been asked to participate in a lineup. At the lineup, you will be obliged to stand in a line with other persons, to speak, to move in a certain manner, and/or to put on or remove certain clothing for the purpose of enabling witnesses to make an identification. You are required to participate in the lineup but you are entitled to have an attorney of your own choosing present. If you cannot afford an attorney but wish to have one present at the lineup, the lineup will be delayed until an attorney has been appointed by a court to represent you. Having an attorney present will help you in the preparation of your defenses to any identification which may be made at the lineup.

However, you may waive your right to have an attorney present at the lineup and consent to participate in the lineup in the absence of an attorney.

WAIVER AND CONSENT

I have (read) (had read to me) this statement of my rights and I understand what my rights are. I am willing to participate in a lineup in the absence of an attorney. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

The government recognizes that "mere acquiescence" or submission to a law enforcement officer's improper claim of lawful authority is insufficient to discharge the government's burden of proving that consent was freely and voluntarily given. *Bumper* v. *North Carolina*, *supra*, at 549. *See, e.g., Amos* v. *United States*, 255 U.S. 313, 317 (1920); *Johnson* v. *United States*, 333 U.S. 10, 13 (1948); *MacKenzie* v. *Robbins*, 248 F. Supp. 496, 501 (D. Maine 1965). In addition, the government concedes that where a defendant's initial detention was unlawful or where there was an attempt to withdraw the initial consent, *Davis v. Mississippi* and *Culp* v. *Murphy*, would be applicable. However, Judge Blumenfeld found the initial "seizure" in this case to be consensual. (Ruling at 11.) The defendant does not allege that an attempt was made to withdraw his prior consent. It is clear that in the case at bar the consent to participate in the lineup was not made in submission to authority when the defendant signed the consent form but was the product of an understanding and intentional waiver of a known right from the outset. There is much more than "mere acquiescence" in the case at bar.

Furthermore, at the time the consent was signed neither the agents nor the defendant placed any significance on the third sentence of the form. The sentence is only one part of a form which begins "You have been asked to participate in a lineup." When the defendant was questioned by his own counsel he stated that he was not told he was "required" to participate in a lineup. He then changed his mind and said he "couldn't remember." (Hr. at 62.) Agent Millen testified that the defendant's participation in the lineup was voluntary and obviously he did not present the consent form to the defendant for the purpose of compelling him to participate in a lineup. (Hr. at 54.) The defendant volunteered to go to the police station with the full knowledge that he was going to appear in a lineup "from the outset." (Hr. at 25; *See also* Hr. at 18, 20, 22, 35 and 44.) He never indicated in any manner that he desired to terminate

his original consent by seeking to leave the police station or by any other means. As Judge Blumenfeld stated, the consent form, although unnecessary in view of *Kirby* v. *Illinois*, 406 U.S. 682 (1972) was obviously concerned with the intimation in *United States* v. *Wade, supra*, that counsel or consent to the absence of counsel were required at all "line-ups." (Ruling at 13.) The Court further held that since the "initial seizure" was consensual and since no attempt was made to withdraw that consent, the written consent was "constitutionally superfluous." (Ruling at 11-12.) The government submits that not only was the entire form constitutionally superfluous but in view of all the testimony the third line was factually insignificant—it simply never influenced the defendant. In view of his prior consent, this form was not used nor did it compel the defendant to participate in the lineup but rather it established his consent to appear in a lineup unassisted by legal counsel. Considering *Kirby* v. *Illinois, supra*, the defendant was given more constitutional protection than he was entitled to receive.

The appellant's reliance on *Cupp* v. *Murphy*, 412 U.S. 291 (1971) fails to recognize that the defendant Murphy resisted and protested the taking of fingernail scrapings by the police (*Id.* at 292.) In *Cupp* v. *Murphy* the search was held constitutionally permissible not because there was probable cause to make an arrest, a factor absent in the case at bar, but because the existence of probable cause *made the detention lawful*, a factor present in this case. Whether the defendant is lawfully at the police station because there was probable cause to arrest or because he properly consented to be there is immaterial, in each case the vice of the unlawful detention in *Davis* v. *Mississippi* is absent. *See Cupp* v. *Murphy, supra*, at 295; *United States* v. *Dionisio*, 410 U.S. 1, 11 (1973).

II.

The defendant freely and voluntarily consented to the warrantless search of his entire apartment including the basement.

After the defendant was identified as the bank robber at the lineup he was placed under arrest. He then executed a written consent to search form which included notice that he had a right to refuse consent, and which authorized agents of the FBI "to conduct a complete search of my premises located at 11 WINTER ST. 1ST FLOOR HARTFORD CONN . . . ."[3] Ms. Edwards, after consulting with her husband, executed a similar consent, and then accompanied several FBI agents back to her apartment. During the search of the first floor a door leading to a basement was discovered. After Ms. Edwards gave oral consent the agents searched the basement. A bag containing a 9mm Czech pistol and $13,790 in cash was found in the basement. Seventy-five $20 bills in the bag represented all the "bait money" taken from the bank.

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[3] The complete text of the consent to search form is as follows:

> I, LEON McCLOUD, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize HARRY B. BRANDON III, and PHILLIP KRUMM, Special Agents of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of my premises located at 11 WINTER ST. 1ST FLOOR HARTFORD CONN AND MY 1973 PONTIAC CONN LICENSE LP 3899. These agents are authorized by me to take from my premises any letters, papers, materials or other property wnich they may desire.
>
> This written permission is being given by me to the above-named Special Agents voluntarily and without threats or promises of any kind.

As previously stated, whether consent is free and voluntary is a question of fact to be determined from the totality of all circumstances and a finding of consent by a District Court will not be lightly overturned. A valid consent may take place after arrest:

> '[I]n those cases where there is probable cause to arrest or search, but where the police lack a warrant, consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.' *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228 (1973).

See also United States v. *Heimforth*, 493 F.2d 970 (9th Cir.), *cert. denied*, — U.S. — (1974); *United States* v. *DeMarco*, 488 F.2d 828, 830-831 fn. 7 (2d Cir. 1973); *United States* v. *Mapp*, 476 F.2d 67, 78 (2d Cir. 1973); *United States* v. *Kohn*, 365 F. Supp. 1031, 1034 (S.D.N.Y. 1973).

After examining all the circumstances Judge Blumenfeld held that there was no evidence of any pressure or lack of voluntariness and found the consent voluntary. (Ruling at 18.) The District Court also found as a fact that the words "11 Winter Street, 1st Floor" were placed on the consent form only to distinguish the defendant's premises from the second-floor apartment sharing that same address—not for the purpose of expressly limiting the search to the "first floor." (Ruling at 21-22.)

The appellant concedes that the consent was voluntary but labels the Court's finding that McCloud did not intend to limit the search to the first floor as "startling." (Brief

for appellant at 28.) An examination of the transcript supports Judge Blumenfeld's conclusion that "the proof of the existence of the defendant's objection to a search of his basement has been confined to the conjecture of the defendant's counsel." (Ruling at 27-28.) And, however "startling" this finding may now appear to the defendant when he testified on direct examination he stated:

> Q. And is this a consent to search the premises at 11 Winter Street?
>
> A. Yes.
>
> Q. When you gave this consent did you limit it specifically to any one area at 11 Winter Street?
>
> A. Well, when I signed the consent I gave them specific instructions not to touch any of my business papers. Specific instructions not to touch any. But my papers was taken out of my car.
>
> Q. Did you give them any instructions concerning anything else?
>
> A. They didn't mention anything about the basement.
>
> Q. But on this form did you deliberately limit the search to the first floor?
>
> A. I told them—they asked me could they search the apartment and my car. And I told them or asked them what would they be—you know, not touch any of my paper work, my business papers. That's what I told them. And they told me that they wouldn't touch any of my paper work. (Hr. at 172-173.)

Agent Miller testified that the words "11 Winter St. 1st Floor" were placed on the consent form for the purpose of specifying the area to be searched (the building contained at least one other apartment), not as a result of a limitation imposed by the defendant. (Hr. at 128; *See* Judge Blumenfeld's ruling at 19-21 for a thorough analysis of the testimony in this area.)

Viewing the language of the consent form which authorizes "a complete search of my premises" against the background of the defendant's own testimony it is evident that Judge Blumenfeld's finding that the defendant did not intend to limit the search to the first floor of his apartment is entirely proper. It certainly is not clearly erroneous.

III.

Assuming, *arguendo*, that the defendant did not consent to the search of the basement, consent to search was obtained from a third party who possessed common authority over the basement.

Judge Blumenfeld found that the defendant's common-law wife who possessed common authority over the entire apartment "voluntarily gave oral consent to the agent's search of the basement". (Ruling at 26.) In establishing a valid consent the government is not limited to proof that the consent was given by the defendant but may rely on authority to search obtained from a third-party possessing common authority over the premises being searched. *United States* v. *Matlock*, 415 U.S. 164, 171 (1974). Common authority sufficient to justify a third-party consent requires "mutual use of the property by persons generally having joint access or control . . . ." *Id.* at 171, fn. 7. *See also United States* v. *Pugliese*, 153 F.2d 497 (2d Cir. 1945); *United States* v. *Heine*, 149 F.2d 485 (2d Cir.), *cert. denied*, 325 U.S. 885 (1945).

The appellant argues that Ms. Edwards should have been given warnings as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The consent was made with the knowledge of the right not to consent since Ms. Edwards read and executed the standard written consent to search form approximately one hour prior to the actual search. At the

time of the search Ms. Edwards was not a suspect in the bank robbery.[4] Furthermore,

> The argument that *Miranda* warnings are a prerequisite to an effective consent to search is not at all persuasive. The contrary was implicit in *United States* v. *Mapp, supra,* 476 F.2d at 76-79, where no *Miranda* warnings were given, and explicit in *United States* v. *Kohn, supra,* 365 F. Supp. at 1034. There is no possible violation of Fifth Amendment rights since the consent to search is not 'evidence of a testimonial or communicative nature.' *Schmerber* v. *California,* 384 U.S. 757, 761 (1966). *United States* v. *Faruolo,* 506 F.2d 490, 495 (2d Cir. 1974).

The appellant also argues *Matlock* is inapplicable where a defendant has expressly refused to consent to a search and that the whereabouts of the absent party are relevant. (Brief for Appellant at 33, 36.) Judge Blumenfeld, in ruling below, dealt with these claims:

> The Court need not address the merits of this argument, since it has previously held that the defendant did not so seek expressly to exclude the basement from the scope of the search to which he was willing to consent. Even if it were to be held as a matter of law, contrary to this Court's holding herein, that the defendant's written consent to search was too vague, in view of the government's burden of proof, to be applicable to the search of the base-

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[4] FBI Agent Harry Brandon testified:

> Q. So would it be fair to say that you had some suspicion in your mind that perhaps Eva Edwards had been involved in the robbery?
>
> A. None whatsoever.
>
> Q. She wasn't a suspect at all to you?
>
> A. No. There was a lone black male that robbed the bank and was seen getting into his car by himself. (Hr. at 149.)

ment, there remains this Court's findings of fact that apart from whether or not the defendant expressed his legally cognizable *consent* to the search of the basement, he certainly did not articulate any express *objection* to the search of the basement. Indeed, there is not even any evidence of such an objection, even from the defendant himself. However useful such an objection may be as a postulate by which the defendant's conduct in giving his address as 11 Winter Street, "1st floor," assumes cunning significance, the fact remains that proof of the existence of the defendant's objection to a search of his basement has been confined to the conjecture of the defendant's counsel. In such circumstance the government is in no way estopped from availing itself of the third-party consent permitted under *Matlock*.

The defendant also argues that the fact that his whereabouts were known to the searching agents, who had easy access to him, carried with it a requirement that the agents seek consent to the search of the basement from him rather than from a third party. The defendant cites as authority for this point two articles, one case, *United States* v. *Robinson*, 479 F.2d 300, 303 (7th Cir. 1973), and a dissenting opinion in another case, *United States* v. *Stone*, 471 F.2d 170, 174, 177 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). These authorities all ante-date *Matlock*, however, which premised the validity of the third-party consent doctrine on the defendant's assumption of the risk that a co-inhabitant "might permit the common area to be searched." 42 U.S.L.W. at 4254, n. 7. *Matlock* cannot be read as if the risk so assumed is a sliding scale of liability to a search of common areas under a third party's consent, with the risk varying inversely to the defendant's accessibility to the police at the time the third party's consent to the search is elicited. Save for whatever estoppel may be posed by one of the

co-inhabitant's express refusal to consent to a search and demand that the authorities seure a warrant, *Matlock* appears to recognize in any one of several co-inhabitants an absolute right at any time "to permit the inspection in his own right" of the property jointly inhabited or controlled. *Id.* (Ruling at 27-29.)

CONCLUSION

The government, for the reasons submitted, respectfully urges that the judgment of conviction be affirmed.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-1061

UNITED STATES OF AMERICA

Appellee

v.

LEON EUGENE McCLOUD

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Robert Dannenmann, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 432 59th Street Brooklyn, N.Y.

That on the 4th day of June, 1975, deponent served the within Brief for the Appellee upon David S. Golub, 733 Summer Street P.O. Box 3247 Stamford, Connecticut 06905

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Robert Dannenmann

Sworn to before me,

This 4th day of June 1975

Edward A Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 197_

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 197_